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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1016

EVENING NEWS ASSOCIATION and
MARTIN S. HAYDEN,
Petitioners,

vs.

PATRICIA ARBER, et al.,
Respondents.

RESPONDENTS' REPLY TO PETITIONERS' REPLY BRIEF

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WO. 2-8745—WO. 2-8732

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Aside from Petitioners' repetition of arguments already heard by and passed upon by the Michigan Supreme Court, Petitioners' Reply is totally unresponsive to Respondents' Objections to the Issuance of Writs of Certiorari. Petitioners make four arguments—one of which is misleading, one of which is factually incorrect, and two of which are attempts to adopt contradictory positions in an effort to use only those parts of the key Ferry affidavit which they think are most advantageous to them.

1. They belabor their claim of Times privilege.

A reference to the decision of the Michigan Supreme Court, however, shows clearly that *Times* standards were applied in accordance with the guide lines laid down by this Court.

2. They state that "Respondents now tacitly concede that the newspaper report . . . is privileged and unactionable."

Respondents have not "now", or ever, tacitly or otherwise conceded that either the preparation, publication and distribution of Exhibit A, or the subsequent newspaper publications by Petitioner ever were privileged or qualifiedly privileged.

In their Objections filed in this Court and cause, as in all of the pleadings and proceedings in the lower courts of Michigan, Respondents repeatedly have challenged and denied the claims of privilege or qualified privilege by Petitioners. Respondents repeatedly have called attention to the fact that their actions of libel were and are based upon the preparation, publication and wide distribution of Exhibit A; that Exhibit A in turn was conceived as part of a scheme to get publicity for John H. Stahlin (then a candidate for Lieutenant Governor of Michigan), and to destroy politically one Richard Durant; and that the newspaper articles published by Petitioners subsequent to Exhibit A are evidence touching upon the material and disputed question of malice.

Respondents consistently have maintained that the background and circumstances leading to the preparation, publication and wide distribution of Exhibit A were of such

nature as to destroy completely the attempted cloak of privilege or qualified privilege. The question of privilege or qualified privilege was and is one of the disputed and material questions of fact, which can be determined only upon a trial on the merits.

Even if it were found upon trial on the merits that the preparation, publication and distribution of Exhibit A could have been within the status of qualified privilege, there still would be the disputed and material question of malice and abuse of qualified privilege.

Petitioners rely on the opinions of the trial court and the Michigan Court of Appeals to sustain their claim of privilege, but both of the lower courts were reversed by the Michigan Supreme Court, which properly went to the heart of the matter before it.

3. They claim that the Ferry affidavit contains hearsay.

Condemning the Ferry affidavit for hearsay about defendant-Petitioner Hayden, in the next breath Petitioners justify their use of hearsay as the basis on which they believed the truth of the material in Exhibit A.

(Actually, this was an admission against interest, by a defendant, to one who was acting with him for their common purpose. It was not hearsay.)

All that this claim of Petitioners does is to emphasize the point that there are material issues of fact involved. Respondents should have their day in Court to examine witnesses and resolve such issues.

4. They claim that the Ferry affidavit shows the material in Exhibit A was believed to be true.

Several times in their Objections, Respondents pointed out that the Ferry affidavit was self-serving in part. One could hardly expect that the writer of Exhibit A, and a close associate and agent of defendant-Petitioner Stahlin, would admit before trial that he had no grounds for believing what he wrote.

More importantly, Petitioners by making this claim have exposed their own affidavits as false.

Both the Engel and Hayden affidavits state that "the only action taken" in reference to Exhibit A was to publish a newspaper story reporting the sending of Exhibit A to the Fair Campaign Practices Commission and Richard Durant's comments thereon. These statements on their face cannot be true if Petitioners now accept Ferry's affidavit, which states that he received material from Engel later used in Exhibit A, and that Engel confirmed the truth of such material to him.

They cannot simultaneously take the position assumed in the Engel and Hayden affidavits that they stood aloof from the construction of Exhibit A and accepted it in its final form, somewhat as a holder in due course, and then proceed to use the Ferry affidavit to prove their belief in the truth of Exhibit A, without also accepting the Ferry affidavit's proof of Engel's activity beyond that claimed in the Engel and Hayden affidavits.

Once again Petitioners have shown that there are material and disputed issues of fact.

For the reasons, arguments and authorities set out in Respondents' original Objections and this Reply, Respond-

ents respectfully urge that the petitions for certiorari on behalf of Petitioners the Evening News Association, Martin S. Hayden, John H. Stahlin and Paul D. Bagwell, be denied with costs to these Respondents in their behalf sustained.

Respectfully submitted,

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